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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF

For: State of Ohio, Tax Commissioner

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INDEX

		Page
I.	Introduction	1
II.	The Constitutional Issue	1
III.	The Original Package Doctrine – What It Has Come To Mean	3
IV.	The Practical View of Brown v. Maryland	5
V.	Conclusion	7

CITATIONS

Cases:

Brown v. Maryland,
25 U.S. (12 Wheat.) 419 (1827) 3, 4, 5, 6, 7, 8

Columbus Steel Supply Co. v. Kosydar, 38 Ohio St. 2d 258 (1974) 6, 7

Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945) .. 3, 4

May v. New Orleans, 178 U.S. 496 (1900) 3, 5, 6, 7

Richfield Oil Co. v. State Board of Equalization, 329 U.S. 69 (1946) 2

Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) 2, 4, 5, 6, 7, 8

Constitution:

Art. I, Sec. 10, Cl. 2, United States Constitution 2, 8

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I. Introduction

The Tax Commissioner of Ohio is concerned about the case at bar due to the fact that petitioner operates a distribution warehouse like the one in Georgia in the city of Cleveland, Ohio. The imported goods are handled in the same fashion at both locations. If petitioner succeeds in its argument concerning immunity from state taxation of the property in the case at bar, then the same argument will be binding with respect to the treatment of the imported inventory at the Cleveland facility. Such a result would decrease the tax base in Cuyahoga County, Ohio, to the detriment of other taxpayers in that location.

II. The Constitutional Issue

The Court is called upon to decide herein whether the general personal property tax of the State of Georgia may apply to imported tires shipped in bulk in a large container and

tire tubes shipped in small boxes in vans and trailers, which are unloaded at a Georgia warehouse and are stacked according to size and style while awaiting sale to retail dealers. The Court is urged by petitioners to declare the Georgia ad valorem levy of tax upon such goods void as an impost or duty upon imports violative of Art. I, Sec. 10, Cl. 2 of the Federal Constitution.

The brief filed on behalf of other amici by the Los Angeles, California, county counsel has advanced well-drawn historical, textual, and case law arguments which urge the Court to sustain the tax. This brief will focus upon one of the arguments advanced by those amici – that of the application of the principles of *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959), to the case at bar. Such an application would result in the validation of the levy upon the imported goods in the case at bar, while preserving the intent and structure of the "original package doctrine" as it has been interpreted by this Court. For although the Tax Commissioner of Ohio agrees with the amici on the historical arguments advanced to the effect that Art. I, Sec. 10, Cl. 2 was only meant to apply to *discriminatory* levies, it is perhaps too late in the day to replace a time-honored doctrine of the Court with an "intent of the Framers" argument. In fact, this Court has rejected a similar historical argument when it was made with regard to the export side of Art. I, Sec. 10, Cl. 2. *See Richfield Oil Co.* v. *State Board of Equalization*, 329 U.S. 69 (1946).

The other amici have capably set out the historical and textual arguments in support of the "discriminatory" levy position. They are there for the Court to call upon should it decide the shackles of the past are too confining. This brief, however, will argue for the application of *Youngstown Sheet & Tube Co.* v. *Bowers, supra*, to the case at bar, as a matter of the practical balancing of interests which comprises the "original package doctrine."

III. The Original Package Doctrine – What It Has Come To Mean

A. *Brown* v. *Maryland, May* v. *New Orleans,* and *Hooven & Allison Co.* v. *Evatt.*

It almost goes without saying that Chief Justice Marshall was not laying down an ironclad rule in *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827), wherein the "original package doctrine" had its inception. The breaking of the import package was discussed in that case because the challenged tax was on such packages. But, as forcefully argued by the other amici, the breaking of the package was not intended to be the sole criterion in determining the immunity. The opinion set forth a nonexclusive list of the factors to be considered in determining whether goods are "imports" exempt from state taxation. One of these factors was whether the goods were brought in by the importer "for his own use" and were "used" by him. If they were, they had become part of "the common mass" of property not immune from state taxation. 25 U.S. (12 Wheat.) at 443. This factor was used along with the others to determine specifically whether the importer had "so acted upon the thing imported" so as to mix it up with the common mass of property, thus losing "its distinctive character as an import." 25 U.S. (12 Wheat.) at 441-2.

May v. *New Orleans*, 178 U.S. 496 (1900) involved imported items packaged in small parcels and received from abroad in large crates. The importer broke the crates in order to expose the smaller packages for resale. New Orleans imposed a property tax on those packaged items so held for resale. The Court found that the large crates were the "original packages" and held that the tax was constitutional because the parcels were being used by the importer, *viz.*, they were being held for resale. 178 U.S. at 509.

Both *Brown* and *May* involved the merchandising inventory of importer sellers. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) concerned the manufacturing inventory of an im-

porter manufacturer. There, the Court determined that the Import-Export Clause was equally applicable to goods imported for manufacturing. The case was anomolous because while it stated that when imports are "used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end" (324 U.S. at 665), the goods in that case were held to be exempt from state taxation because they were imported by the manufacturer "for his own use." The ultimate holding of the Court thus seemed to be in direct contravention of *Brown* v. *Maryland, supra,* at 441-3.

B. *Youngstown Sheet & Tube Co.* v. *Bowers*

The ultimate holding of the Court in *Hooven & Allison Co.* v. *Evatt, supra,* was arguably overruled *sub silentio* by the Court in *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534 (1959). The Court in *Youngstown* pointed out that the decision in *Hooven* was basically in accord with the tenets of past import tax cases. Although *Hooven* did state that a manufacturer's goods imported "for his own use" were immune, which was in contravention of the holding of *Brown* v. *Maryland, supra,* the language of the decision did indicate that it was in accord with the basic proposition in *Brown* that when imported goods are put to the use for which they were imported, they cease to be imports. 358 U.S. at 542.

The Court in *Youngstown* held that because the importer had imported the goods to supply its "current operating needs" they were subject to state taxation "because at the time of the assessments they were being used, in every practical sense, for the purposes for which they had been imported." 358 U.S. at 359. *Hooven* was distinguished on its facts as being a case not involving goods used for "current operational needs." 358 U.S. at 544. The Court in the companion case to *Youngstown* made it clear that the fact that wood veneers were received in bundles was inconsequential with regard to goods for use in manufacture. If they were imported and intended to be used for "current operational needs", they were amenable to tax-

ation whether or not the "original package" was broken. 358 U.S. at 548. The Court concluded that allowing an exemption to attach to a manufacturer's goods imported to be used for "current operational needs" would discriminate in favor of imported manufactured goods, to the detriment of domestically produced goods, and that result could not be imputed to the Framers of the Constitution. 358 U.S. at 550.

IV. The Practical View of Brown v. Maryland

As was emphasized by the Court in *Brown* v. *Maryland, supra,* and noted by the Court in *Hooven & Allison Co.* v. *Evatt, supra*: "[R]econciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter." 324 U.S. at 668. Because the "current operational needs" test of *Youngstown Sheet & Tube Co.* v. *Bowers, supra,* goes to the true basis of the "original package doctrine," *viz.*, goods retain their import character until used for the purposes for which they were imported, that test should be applied in the case at bar even though it involves an importer seller.

It may be that the same result may be reached in importer seller cases as under the "current operational needs" test applied to importer manufacturers. *Brown* v. *Maryland, supra,* made clear that the true object of the tests proposed in that case was to determine if the importer has treated the goods as part of the general mass of property in the country. One of the ways to determine that was to determine if the original package had been broken. But *Brown* clearly did not intend that an unbroken package *ipso facto* was still an import. That decision also provided that another test to determine the quality of the goods was whether the goods were imported for the importer's own use and were used by him here.

May v. *New Orleans, supra,* applied this last test to an importer seller. Although the Court in that case determined that the large shipping crate containing the smaller packages was the "original package" for the purposes of the application of the

first test of *Brown*, part of the *ratio decidendi* in that case was the fact that at the time of the assessment, the smaller unbroken packages "were in the market for sale" and therefore "subject to be taxed as like property, in the same condition, that had its origin in this country." 178 U.S. 509. The above language from *May* seems to be a statement of the "current operational needs" test used by the Court in *Youngstown* with regard to the imported raw materials of a manufacturer. If an importer seller factually makes the imported goods available for sale (the analogue of "current operational needs" for a seller), they have lost their character as imports just as goods to be used by a manufacturer for "current operational needs." That position was urged by the Tax Commissioner of Ohio and was adopted by the Supreme Court of Ohio in the recent case of *Columbus Steel Supply Co.* v. *Kosydar*, 38 Ohio St. 2d 258 (1974).

Of course, as in *May*, the Ohio court did deal with the "original package" issue, resolving it in favor of the Tax Commissioner with a "commercial unit" analysis, i.e., the "original package" involved was the commercial unit of importation, and when the imported goods at issue were separated from the aggregate of goods comprising the shipment, the package was "opened." After the Supreme Court of Ohio discussed *Brown* v. *Maryland, supra*, and *May* v. *New Orleans, supra*, it used the following language in upholding the levy:

> "We recognize that the case law which embodies the original package doctrine has established a general focus of inquiry which, in the final analysis, requires an evidentiary determination that the actions of the importer upon the imported items caused a cessation of the tax immunity.
>
> "Appellant acted upon the pipe in this way: As the pipe was unloaded, appellant severed bands around some of the pipe in the commercial unit; the unit was then distributed in a sorting process where like pipes were gathered together; the pipe was placed in segregated stacks, presumably with like pipe which had arrived in previous imported shipments; the pipe then became in-

> ventory stock exhibited for sale; and pipe was removed piecemeal from the stacks for sale to buyers.
>
> "In light of those facts, we hold that appellant so acted upon the imported steel pipe as to cause the pipe to become incorporated and mixed up with the mass of property in this state • • •." 38 Ohio St. 2d at 263

Undoubtedly, in this case, as in *May* and *Columbus Steel Supply*, the Court could deal with the "package" issue by means of a "commercial unit" analysis. Such an analysis would demonstrate that the commercial unit of importation was the van or trailer and that the separation of the tires and tubes from that container constituted "breaking" the package. The point of this brief is that such machinations need not be part of the analysis. *Brown* v. *Maryland, supra*, did *not* declare that an imported package must be broken to be considered taxable.

V. Conclusion

In summary, it is submitted that just as the importer manufacturers in *Youngstown Sheet & Tube Co.* v. *Bowers, supra*, were held to be not immune from state taxation because they were factually determined to have used the goods taxed for "current operational needs," so too should an importer seller such as Michelin be held not immune from state taxes when it has factually treated the goods as current inventory. *May* v. *New Orleans, supra*, provides the basis for such a holding. Additionally, it should be made clear that breaking the package of the commercial unit of importation is not the *sine qua non* of the application of such "current inventory" test. Just as the veneer bundles being unbroken was inconsequential in the companion case to *Youngstown* because of the Wisconsin court's factual determination that the goods lost their import quality because the importer had used them for his "current operational needs," so too should it be unimportant that an importer seller's packages are unbroken, if it is factually determined that the goods are currently held for sale. That the package has not been broken is only one of the several

factors to be considered in determining whether factually the goods have lost their quality as imports by virtue of the importer's treatment. *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. at 548-9. Importer manufacturers and importer sellers should be treated the same in making the factual determination of whether the goods remain imports. Neither Art. I, Sec. 10, Cl. 2, nor *Brown* v. *Maryland, supra,* authorizes different treatment of these two categories of importers.

The amicus curiae Tax Commissioner of Ohio urges the Court to find that the Georgia ad valorem property tax levied on Michelin's goods in this case is valid and not violative of Art. I, Sec. 10, Cl. 2 of the United States Constitution.

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